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APR 5 1990
DEPT. OF JUSTICE

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DATE: April 5, 1990

SUBJECT: LB 1059 - Constitutionality of "Hold Harmless" Provision Assuring School Districts Will Not Receive Less State Aid for Three Year Period than Amounts Received Under the School Foundation and Equalization Act for 1989-90

REQUESTED BY: Senator Loran Schmit
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion as to the constitutionality of Section 6 of LB 1059. Subsection (1) of Section 6 provides, in part: "Except as provided in subsections (2) and (3) of this section, each district shall receive state aid in the amount that the total formula need of each such district, as determined pursuant to sections 5 and 7 of this act, exceeds its total formula resources as determined pursuant to sections 8 to 11 of this act." Subsection (2) of Section 6 contains a "hold harmless" clause, providing "[a] district shall not receive state aid for each of the school years 1990-91, 1991-92, and 1992-93 which is less than one hundred percent of the amount of aid received pursuant to the School Foundation and Equalization Act for school year 1989-90." Your initial question concerns whether the "hold harmless" provision in subsection (2) of Section 6 of LB 1059 violates the prohibition against special legislation in Article III, Section 18, of the Nebraska Constitution, by the creation of unreasonable closed classifications.

On several occasions, the Nebraska Supreme Court has struck down legislation as violative of the prohibition against special legislation in Article III, Section 18, on the ground that the classifications created unreasonable closed or frozen classes which precluded the opportunity for an increase in the members of the

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class by future growth or development. See, e.g., State ex rel. Douglas v. Marsh, 207 Neb. 598, 300 N.W.2d 181 (1980); City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N.W.2d 74 (1970); State ex rel. Conkling v. Kelso, 92 Neb. 628, 139 N.W. 226 (1912). Most recently, in State ex rel. Douglas v. Marsh, the court held a state statute granting aid to governmental subdivisions utilized a distribution formula which created an unreasonable closed classification in violation of the state constitutional provision prohibiting special legislation. The statute created a fund known as the Local Government Revenue Fund which was designed to reimburse counties for lost revenues resulting from the exemption from taxation of certain types of personal property. 207 Neb. at 601-05, 300 N.W.2d at 183-85.

The supreme court concluded the bill created an arbitrary and unreasonable closed classification in violation of Article III, Section 18. The court found the bill's formula for determining the amount each county would receive created an unreasonable "frozen classification" in that the formula did not make any allowance for changed circumstances which would allow a county to enter into a different classification in future years. Id. at 606, 300 N.W.2d at 186. The court cited its previous decisions in City of Scottsbluff v. Tiemann, supra, and State ex rel. Conkling v. Kelso, supra, for the proposition that classifications which do not allow for increases due to future growth or development are special and violate the State Constitution. The court stated "where it is determined that the classification is based upon happenstance events in a given year and thereafter remains forever, regardless of the changes in circumstances, the classification must be held to be invalid and the act in violation of our State Constitution." 207 Neb. at 609, 300 N.W.2d at 187.

The decision in State ex rel. Douglas v. Marsh illustrates the vice embodied in legislation creating unconstitutional frozen or closed classifications is that the classes created do not permit any increase or change due to future growth or development. In our view, the state aid provisions in Section 6 of LB 1059 do not, construed as a whole, represent the establishment of impermissible closed classifications in violation of Article III, Section 18.

Subsection (1) of Section 6 establishes a new formula for the determination of state aid to school districts based on the amount by which a district's "total formula need" exceeds its "total formula resources." Subsection (2) provides an exception to the use of the aid calculation under subsection (1), however, assuring that a school district shall not receive less in state aid for school years 1990-91, 1991-92, and 1992-93 than one hundred percent of the amount of state aid received under the prior state aid formula for school year 1989-90. In essence, subsection (2)

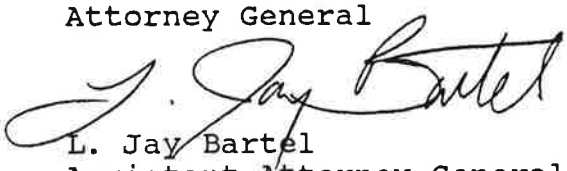
establishes a minimum level or floor below which state aid to a school district cannot fall during a three year transitional period provided to allow for differences resulting from the shift in the calculation of state aid under the new formula provided in subsection (1).

The establishment of such a floor or minimum level, however, does not present the type of closed classification problem presented in State ex rel. Douglas v. Marsh, as the state aid determination for any school district during this three year period is not based solely on the historical rate set in the base year. Rather, the opportunity for an increase due to changed circumstances is provided in that the amount of state aid as determined under subdivision (1) would be provided in the event the exception under subsection (2) is not applicable to a particular district. Thus, the state aid provisions in Section 6 of LB 1059 do not establish unreasonable or arbitrary closed classifications between school districts, as changes due to future growth or development are taken into account in determining the level of state aid to be provided under the bill. Furthermore, we cannot conclude the establishment of a "hold harmless" provision of this nature for such a period is unreasonable or arbitrary.

In conclusion, it is our opinion that the "hold harmless" exception provided in LB 1059, assuring school districts will not receive less state aid for a three year period than amounts received under the School Foundation and Equalization Act for 1989-90, does not, construed together with the entire state aid distribution provisions in Section 6 of the bill, violate the constitutional prohibition against special legislation. In light of our opinion in this regard, it is unnecessary for us to consider your second question as to the severability of this portion of the bill.

Very truly yours,

ROBERT M. SPIRE
Attorney General



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cc: Patrick J. O'Donnell
Clerk of the Legislature
APPROVED BY:

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